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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

PETITIONER'S SUPPLEMENTAL BRIEF REPLYING TO SUPPLEMENTAL BRIEF OF RESPONDENT RE INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT JUDGMENT BELOW.

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INDEX.

Cases Cited.

	Page
[illegible] v. *Moore*, 85 N. H. 362	6
[illegible] v. *Paul*, 167 Fed. 784	6
Kansas City Co. Ry. v. *Albers Comm. Co.*, 223 U. S. 573	8
Kinney v. *Supreme Lodge*, 252 U. S. 411	8
Lovenbaum v. *Hanover*, 253 Mass. 19	6
Milwaukee County v. *White Co.*, 296 U. S. 268	7
Newman v. *Gates*, 204 U. S. 89	10
People v. *Ladew*, 237 N. Y. 413	6

Text Books.

Williston on Contracts, Revised Edition, pp. 1296	6

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Respondent's principal contention is that no relief will be granted in this Court if the judgment of a State court is based upon a non-Federal ground adequate to support it. It is claimed that the Ohio courts have held that petitioner was not the real party in interest in Ohio.

To apply the principle upon which respondent relies the non-Federal ground must be (1) broad enough to sustain the judgment; (2) it must be independent, that is, not so interwoven with the Federal question as to be inescapable of separate treatment and determination; and (3) if the non-Federal ground is plainly untenable, it will not defeat

review. (See petitioner's main brief, pages 33, 34; and petitioner's reply brief, pages 2-5.)

How does respondent's present contention meet the prescribed test?

To find that petitioner was not the real party in interest in Ohio, the Ohio courts first decided that petitioner was not the real party in interest in the New York suit and that he perpetrated a fraud upon the New York courts. In making such determination, the Ohio courts went, of necessity, behind the New York judgment, conclusive as to all matters which were actually determined and all matters which might have been litigated—including the defense of lack of capacity to sue. It follows, therefore, that the so-called non-Federal ground, referred to by respondent, is not a ground independent of the judgment itself and this Court may properly give consideration to the Federal right involved.

It is no answer to say that the decision in Ohio rested on the independent ground that petitioner was not the real party in interest in Ohio under that State's procedural statute *because the decision did not in fact rest upon that ground.* An examination of the opinions and decision rendered in the Ohio courts bears out this statement.

The Court of Appeals said (R. 181), in referring to the reassignment of December 1st, 1925, that:

> "If the rights of the parties are fixed by the instrument termed 'Article of Agreement' and Walter Titus transferred any such legal or equitable interest or both in his claim to the plaintiff as would entitle him to maintain an action in his own name in New York, *then he was a proper party in interest there and a proper party in interest here.* This is true without respect to the assertions of fact made in the affidavit of plaintiff in the injunction proceeding in New York, because the plaintiff, though he may have misinterpreted the import of the agreement, could not change its effect in law." (Italics ours.)

The Court of Appeals also stated (R. 185) with regard to the reassignment:

> *"The article of agreement having been executed subsequent to November 23, 1925, and before suit would support the right of plaintiff to institute his suit in New York if it clothed him with authority so to do.* But the effect of the article of agreement was not to be determined by a finding of fact but by judicial construction as a matter of law. At law it bears but one construction and that is against the claim of the plaintiff that he was the real party in interest in the action *in New York.*" (Italics ours.)

From the foregoing it is apparent that the Ohio Court of Appeals made no attempt to apply the Ohio procedural statute. That court realized that the Ohio courts could not apply the Ohio procedural statute to a suit on a New York judgment if the assignee could maintain suit, in New York, under the assignment of the original cause of action. The Court of Appeals applied what *it thought* to be the New York law to the reassignment made prior to judgment.

When the Court of Appeals stated that the petitioner was not the real party in interest in Ohio the statement was linked up directly with the point that petitioner was not the real party in interest *in New York* (R. 180; 186). In holding that the reassignment was ineffective, the Court of Appeals cited two New York authorities (R. 183; 184), both of which that court misconstrued. (See petitioner's main brief, page 26.)

In other words, the Court of Appeals *did* go behind the New York judgment. In deciding the question as to whether petitioner could bring suit in New York under the reassignment, it decided a question interwoven with the Federal right.

The trial court likewise failed to make its decision on the basis of the Ohio procedural statute. The trial court found as a fact (R. 172):

> "9. That at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant."

This finding of fact that petitioner was not the real party in interest in the New York suit was then followed with a *conclusion of law—not a finding of fact*—that (R. 173):

> "3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name."

It is clear that the conclusion of law was based upon the finding of fact *which did go behind the New York judgment:* and the latter conclusion of law was, therefore, followed by further conclusions that petitioner's judgment was procured in the courts of New York through fraud practiced upon the New York courts, because petitioner was not the real party in interest in the New York suit, and that by reason thereof "the said judgment so obtained in the State of New York was and is impeachable there for fraud and it was and is to the same extent impeachable in the courts of Ohio" (R. 173).

It is significant that the trial court's opinion disregarded the reassignment, whether under the New York law or under the Ohio law—refusing to decide whether the reassignment constituted petitioner the real party in interest "under the statutes of New York or of Ohio or both" (R. 155)—and

that it is aimed entirely at the question of fraud on the New York courts as a means of assailing the judgment; which in turn is, naturally, predicated on petitioner's alleged inability to maintain suit under the New York law. The trial court disregarded the Ohio procedural statute and dealt with a possible qualification of the constitutional right which attaches by reason of the full faith and credit clause.

If further proof is necessary of the fact that the trial court regarded the question before it as interwoven with the Federal right, one need only refer to the trial court's opinion in so far as it "*considered together*" the affirmative defense that petitioner was not the real party in interest in Ohio and the affirmative defense that the judgment in the State of New York was procured through fraud practiced upon the court because petitioner was not the real party in interest in that suit (R. 149).

In summary, it is apparent that the trial court dealt with the case as one which involved a constitutional question. It found *as a fact* that petitioner was not the real party in interest in New York; it then *concluded* that he was not the real party in interest in Ohio and it *concluded*, further, that the New York judgment was impeachable in Ohio. The Ohio courts did not deal with the real party in interest question as an independent procedural question. If the Ohio courts had dealt with it in that manner, then they would have indicated that the New York judgment should be respected and they would have referred to some other person as the proper party to maintain suit in Ohio on the judgment. But if the Ohio courts had indicated that conclusion, then they would have had to recognize petitioner's right to maintain suit on the judgment in Ohio because, on constitutional principles, the right to maintain suit was fixed as of a time prior to recovery of judgment and a judgment-creditor is protected under the full faith and credit clause of the Constitution.

The Ohio courts *must* recognize the right of an assignee of a cause of action to sue in Ohio on a judgment procured in New York if the assignee had the right to bring suit on the original cause of action in New York, because the validity and effect of an assignment is determined by the law of the place where the assignment is made and the right of an assignee to bring suit in his own name is determined by the law of the place where the original cause of action is brought.

Williston on Contracts, Revised Edition, pp. 1296;
Barbin v. *Moore*, 85 N. H. 362;
People v. *Ladew*, 237 N. Y. 413, 438;
Levenbaum v. *Hanover*, 253 Mass. 19, 24;
Dixon v. *Paul*, 167 Fed. 784.

The Ohio courts cannot, therefore, apply a procedural Ohio statute to make a New York judgment a nullity. To say that the Ohio courts applied a procedural statute *only* is to do just that. To say that one may recover on a cause of action in New York but that he may not recover in Ohio on the judgment is to strike at constitutional safeguards.

It is submitted, moreover, that the so-called independent ground relied upon by respondent is plainly untenable. Petitioner has a definite *beneficial* interest in the proceeds of the judgment under the instrument of reassignment (R. 85, 87) and, therefore, he is the real party in interest under the Ohio laws—a fact recognized by the Court of Appeals when it stated (R. 181) that if the reassignment transferred to plaintiff a "legal or *equitable* interest" in the claim as would entitle him "to maintain an action in his own name in New York, then he was a proper party in interest there and a proper party in interest here". In addition, petitioner was the real party in interest under the reassignment, as is established by the abundance of authority on the point (Point III of petitioner's main brief), that is, by the

law of the State under which the validity and effect of the reassignment should be determined.

The legal insufficiency of the ground relied upon by respondent is fully established by the following quotation from *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276:

> "We can perceive no greater possibility of embarrassment in litigating the validity of a judgment for taxes and enforcing it than any other for the payment of money. The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. *That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged.* In the circumstances here disclosed no state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit. Compare *Fauntleroy* v. *Lum*, *supra*.
>
> In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded; *that considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it.* Full faith and credit is required to be given to the judgment of another state although the original suit on which it was based arose in the state of the forum and was barred there by the Statute of Limitations when the judgment was rendered; *Christmas* v. *Russell*, 5 Wall.

290; *Roche* v. *McDonald*, 275 U. S. 449; and where the original suit was upon a gambling contract invalid by the law of the forum where it was made: *Fauntleroy* v. *Lum*, *supra*. It was required where the judgment was for wrongful death, although it was thought that the statute giving the recovery was not entitled to full faith and credit. *Kenney* v. *Supreme Lodge*, *supra*; compare *Converse* v. *Hamilton*, *supra*; *Broderick* v. *Rosner*, *supra*; see also *American Express Co.* v. *Mullins*, 212 U. S. 311." (Italics ours.)

In *Kansas City So. Ry.* v. *Albers*, 223 U. S. 573, at page 593, this Court referred to its power to review findings as follows:

"A like exercise of this power is shown in cases arising under the clause of the Constitution requiring full faith and credit to be given in each State to the Judicial proceedings of every other State. *Huntington* v. *Attrill*, 146 U. S. 657, 684, was such a case. It was a suit in Maryland upon a judgment obtained in New York under a statute of the latter State imposing a liability for the debts of a corporation upon a director making a false certificate respecting its condition. The Court of Appeals of Maryland held that the judgment was for a strictly penal liability and therefore not within the protection of the full faith and credit clause. But when the case came here it was held that '*if the state court declines to give full faith and credit to a judgment of another State, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability.*' And upon reaching the conclusion that in that instance the original liability was not strictly penal this court reversed the judgment of the Court of Appeals of Maryland." (Italics ours.)

Kenney v. *Supreme Lodge*, 252 U. S. 411, involved an action of debt brought in Illinois upon a judgment recovered

in Alabama. The defendant claimed that a statute in Illinois provided that no action should be brought or prosecuted in Illinois for damages occasioned by death occurring in another State in consequence of wrongful conduct. The judgment in Alabama was based upon an action for wrongful death. The Supreme Court of Illinois held that since the original action could not have been brought in Illinois, the Illinois courts had no jurisdiction of a suit on the judgment. In reversing the judgment which affirmed the quashing of plaintiff's demurrer this Court stated the following on page 415:

> "In *Fauntleroy* v. *Lum*, 210 U. S. 230, it was held that the courts of Mississippi were bound to enforce a judgment rendered in Missouri upon a cause of action arising in Mississippi and illegal and void there. The policy of Mississippi was more actively contravened in that case than the policy of Illinois is in this. Therefore the fact that here the original cause of action could not have been maintained in Illinois is not an answer to a suit upon the judgment. See *Christmas* v. *Russell*, 5 Wall. 290; *Converse* v. *Hamilton*, 224 U. S. 243. *But this being true, it is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent.* The assumption that it could not do so was the basis of the decision in *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 111, 112, and the same principle was foreshadowed in *General Oil Co.* v. *Crain*, 209 U. S. 211, 216, 220, 228, and in *Fauntleroy* v. *Lum*, 210 U. S. 230, 235, 236. See *Keyser* v. *Lowell*, 117 Fed. Rep. 400; *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148, and cases cited. Whether the Illinois statute should be construed as the Mississippi act was construed in *Fauntleroy* v. *Lum* was for the Supreme Court of the State to decide, but read as that court read it, it attempted to achieve a result that the Constitution of the United States forbad.

> Some argument was based upon the fact that the statute of Alabama allowed an action to be maintained in a court of competent jurisdiction within the State 'and not elsewhere.' But when the cause of action is created the invalidity of attempts to limit the jurisdiction of other States to enforce it has been established by the decisions of this court; *Tennessee Coal, Iron & R. R. Co.* v. *George*, 233 U. S. 354; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55; and had these decision been otherwise they would not have imported that a judgment rendered exactly as required by the Alabama statute was not to have the respect due to other judgments of a sister State." (Italics ours.)

The authorities cited by respondent that this Court will not review findings of fact concurred in by trial and appellate courts show, distinctly so, the limitation of that rule where clear error appears.

It is significant also that respondent's supplemental brief fails to take cognizance of the distinction between a suit on a judgment and a suit upon the original cause of action. He cites no case wherein procedural matter was utilized for the purpose of attacking and nullifying the judgment of a sister State.

Newman v. *Gates*, 204 U. S. 89 (respondent's supplemental brief, page 12) is not applicable herein because the appellate court made no attempt to pass upon a foreign judgment. Its ruling made provision so that full faith and credit could be given to a foreign judgment after appellate procedure was clarified. The appellate court disposed, merely, of a preliminary question and this Court held that it had no power to review because, in effect, no appeal was taken to the highest State court and there was, therefore, no final judgment or decree upon which review could be predicated. *In the instant case there is a final judgment.* Respondent's argument, based upon the *Newman* case—that there is no distinction between the inability of this Court

to consider an alleged Federal question not ruled on by the higher State court because the case was not properly before it "and the present situation wherein the case was never properly in the state courts at all"—is both inapplicable and fallacious. In the instant case, jurisdiction of the parties and subject matter was acquired by the Ohio court and, therefore, the case was properly in the State court. Respondent makes the futile attempt to create an analogy between an appellate court's refusal to hear the case on the merits because of procedural omission, which is, in effect, lack of appellate jurisdiction, and a situation wherein the trial court acquired full jurisdiction and proceeded to deny relief after a trial on the merits.

It is submitted that in view of the foregoing, the conclusion must follow that there was no decision in either Ohio court based upon an independent non-Federal ground, adequate to support it.

Respectfully submitted,

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